United States – Anti-Dumping Act of 1916 **(WT/DS136)**
Recourse by the United States to Article 22.6 of the DSU

Answers of the United States
to the Arbitrator's Questions to the Parties

November 20, 2003

Questions for both parties:

Question 1. Do the parties agree that the EC request (WT/DS136/15) constitutes a request to suspend 'other obligations' within the meaning of DSU Article 22? If so, do the parties consider that a request to suspend 'other obligations' rather than concessions is a choice of the requesting party that is not subject to review by the Arbitrator? Why?

1. In its request, the European Communities ("EC") simply states that it seeks authorization "to suspend the application of the obligations under GATT 1994 and the Anti-Dumping Agreement in order to adopt an equivalent regulation to the 1916 Act against imports from the United States." To this day, it has not identified which obligations it intends to suspend (unless it intends to suspend *all* obligations under GATT 1994 and the Anti-Dumping Agreement, which appears highly unlikely), however on the face of its request the EC would appear to intend that its request cover only "other obligations" within the meaning of DSU Article 22. At the same time, because the DSB is ultimately asked to authorize the suspension of concessions or other obligations, it stands to reason that the DSB would need to know *what* concessions or other obligations it is authorizing to suspend.

2. In any event, the choice of whether to suspend "concessions" or "other obligations" would appear to be the choice of the complaining party, and there is nothing in the DSU that would indicate a basis for an arbitrator to find that the choice had been exercised inappropriately, other than the procedures under Article 22.3. At the same time, the distinction would appear to make little difference since the two terms are used interchangeably in Article 22. The United States is not raising a claim in this proceeding that requires distinguishing between a "concession" and an "other obligation."

3. Whether a request to suspend relates to "other obligations" or "concessions," that request is subject to review by the Arbitrator, particularly in a situation such as this, where the EC is claiming that there is no need to quantify the level of trade affected by its proposed suspension of obligations. Because Article 22.7 requires the Arbitrator to determine that the level of such suspension does not exceed the level of nullification or impairment, if the requesting party refuses to quantify the level of such suspension, the Arbitrator is left with no choice but to review the details of the proposed suspension (including what are the specific obligations to be suspended) in order to try to fulfill its mandate under Article 22.7.

4. The EC incorrectly interprets the first sentence of Article 22.7 as stating that arbitrators cannot review a requesting party's choice of which concessions or other obligations to suspend. However, contrary to the EC's position, the first sentence of Article 22.7 does not state that arbitrators "shall not examine the concessions or other obligations to be suspended." Rather, it states that arbitrators "shall not examine *the nature of* the concessions or other obligations to be suspended." (Emphasis added.) As made clear in our submission and oral presentation, the purpose of arbitration under Article 22.6 of the DSU is to ensure that a DSB-authorized suspension does not result in the loss of benefits under the WTO agreements in excess of the loss of benefits that resulted from a measure found to be inconsistent with a covered agreement. By identifying the specific concessions or other obligations to be suspended, the requesting party provides important information that might facilitate a determination regarding the "level" of suspension, particularly in a situation where the requesting party simply refuses to quantify the level of suspension and the level of nullification or impairment.

<u>Question 2.</u> Are there any minimal procedural standards applicable to requests under DSU Article 22.2, similar to the Article 6.2 standards that apply to requests for panels? If so, is an arbitrator acting under Article 22.6 required to review a request under Article 22.2 to ensure compliance with such minimal procedural standards?

5. Yes, there are minimal procedural standards applicable to requests under DSU Article 22.2. These standards include the following. The request must provide sufficient information for the responding party to know the "level of suspension proposed" in order to know whether to object to this level, as provided in Article 22.6 of the DSU. Article 22.3(e) imposes certain procedural requirements relating to the request. Article 22.5 also requires that a certain amount of detail concerning the request to suspend concessions or other obligations. An arbitrator may review a request to ensure compliance with the applicable procedural standards.

6. Furthermore, as arbitrators have recognized in the past, "[t]o give effect to the obligation of equivalence in Article 22.4, the Member requesting suspension ... has to identify the level of suspension of concessions it proposes in a way that allows [the arbitrator] to determine equivalence."[1] Therefore, there appears to be at least a minimal requirement to identify the level of proposed suspension with such specificity so as to allow arbitrators to determine equivalence.[2]

7. Although the EC has refused to identify explicitly the level of suspension that it proposes, the EC has essentially identified that level as infinite. In the circumstances of this proceeding, in

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[1] *See, e.g.,* Article 22.6 Arbitration Award in *European Communities – Measures Concerning Meat and Meat Products (Hormones) – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WT/DS26/ARB, 12 July 1999, para. 20.

[2] For the purposes of this arbitration, it is not necessary to determine at what point this requirement is to be fulfilled (i.e., in the Article 22.2 request or, instead, at some later point, during the initial stages of the arbitration proceeding).

which the level of nullification or impairment in question is zero,[3] and the proposed level of suspension is infinite, it is a straightforward matter for the Arbitrator to determine that the levels are not equivalent. But even if the Arbitrator were to conclude that the EC's proposed level of suspension is not infinite, it is undisputed that such a level is nevertheless above zero, thus the level of suspension resulting from the EC's proposal would still not be equivalent to the level of nullification or impairment.

<u>Question 3.</u> If such minimal procedural standards existed but had not been met, what consequences would flow from that? Would the party that made the initial Article 22.2 request be entitled to submit a revised request?

8. Nothing in the DSU allows a party to re-submit a revised Article 22.2 request if it has not identified the level of proposed suspension in such a way as to permit arbitrators to determine equivalence.[4] However, as the United States discusses in response to Question 2, the Arbitrator need not determine the consequences of not meeting this minimal procedural standard because the EC's proposal has the effect of establishing the level of suspension as infinite.[5]

<u>Question 4.</u> Does the negotiating history of the DSU provide any relevant guidance as to the meaning to be ascribed to the terms "level" (found in Articles 22.4, 22.6, 22.7 and 23.2(c)) and/or "equivalent" (Article 22.4, 22.7)?

9. The United States notes at the outset that the ordinary meaning of the terms "level" and "equivalent" in Article 22 is clear, when these terms are read in context and in light of the object and purpose of the DSU. Indeed, the arbitrator in *United States – Tax Treatment for 'Foreign Sales Corporations'* reviewed Articles 22.4 and 22.7 and concluded that "[t]he drafters have *explicitly* set a *quantitative benchmark* to the level of suspension of concessions or other obligations that might be authorized."

10. The New Shorter Oxford English Dictionary defines "level" as, *inter alia*, "A position (on a real or imaginary scale) in respect of amount, intensity, extent, etc.; a relative height, amount, or value." This definition is the most appropriate in the context of Article 22 because Article 22 provides a "scale" with which to determine whether equivalence exists.

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[3] In this proceeding, only the United States has identified the level of nullification or impairment and supplied evidence in support of this identification. The EC has neither quantified the level of nullification or impairment, nor provided any evidence in support of its position regarding the correct level of nullification or impairment. Indeed, the EC has failed – to this day – to identify both the level of suspension it proposes and the level of nullification or impairment in ways that would allow the Arbitrator to determine equivalence.

[4] Indeed, it would appear difficult to reconcile a new request, and hence presumably a second arbitration if the responding party were for example to object to the level of suspension proposed in any new request, with the restrictions in Article 22.7 on any second arbitration.

[5] Those consequences would presumably need to be informed by the provisions of Article 22.7.

11. The EC argues that "level" means "having equality with something else, equable, well-balanced in quality."[6] Yet this interpretation is simply not in accordance with customary rules of interpretation of public international law. For one thing, the EC's definition of "level" refers to the use of that term as an adjective (as in the sense of a "level" playing field), even though the term "level" is used as a noun in Article 22.4 and 22.7.[7] For another, the EC's definition would render "level" redundant to "equivalent," which is not permitted under the customary rules. Indeed, such a definition would strip an Article 22.6 arbitration of its utility, and would render Article 22.4 and 22.7 meaningless.

12. In sum, a proper interpretation of "level" and "equivalent" based on the ordinary meaning of those terms in their context and in light of the object and purpose of the DSU does not leave the meanings of those terms "ambiguous or obscure," nor does it lead to a result which is "manifestly absurd or unreasonable." (Indeed, it is manifestly *reasonable* that the "amount, intensity or extent" of the impact of suspension should not exceed the "amount, intensity or extent" of nullification or impairment of benefits.) There would therefore appear to be no need to refer to the negotiating history of the DSU for guidance as to the meaning of these terms.

13. In this particular case, the United States is not aware of anything in the negotiating history that sheds light on the meaning of these terms.

> **<u>Question 5.</u> When arbitrators in previous cases have determined a different level of suspension of concessions or other obligations than the one proposed by a party, they have made their own determination of the equivalent level. Would this be appropriate in the present case, in light of the measure proposed by the European Communities? If so, would the Arbitrator be entitled to apply another methodology to determine the level of nullification or impairment and request additional information from the parties accordingly?**

14. In previous cases, when arbitrators have found that a proposed level of suspension of concessions or other obligations is not equivalent to the level of nullification or impairment, they have done so based on the conclusion that the claimed level of *nullification or impairment* was not correct. Thus, determining a different level of suspension was simply a function of determining the correct level of nullification or impairment.[8] In this particular case, the EC has

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[6] *See* EC Submission of November 3, 2003 at para. 17.

[7] *See, e.g.*, the New Shorter Oxford English Dictionary, Oxford 1993, Vol. 1, p. 1573.

[8] In those proceedings, where the level was not zero, the arbitrators presumably anticipated that there could be an additional request by the complaining party pursuant to the last sentence of Article 22.7 and wished to facilitate the analysis of whether that request met the requirements of that sentence.

not provided a level of nullification or impairment[9] while proposing an unlimited or infinite level of suspension. At the same time, the United States has provided evidence and argument as to why the level of nullification or impairment is zero. Accordingly it would be appropriate in the present case for the Arbitrator to determine a different level than that argued by the EC, and to determine that this level is zero.

15. There can be no question that the Arbitrator is entitled to request any additional information it deems necessary to fulfill its mandate under Article 22.7.

Question 6. Are the "qualitative" and "quantitative" approaches to the suspension of obligations mutually exclusive? If not, would it be possible to combine them in the present case?

16. Pursuant to Article 22.7, the Arbitrator is to (1) assess the level of the EC's proposed suspension; (2) assess the level of nullification or impairment of the EC's benefits under the relevant agreements (the GATT 1994 and Anti-Dumping Agreement)(i.e., the *effect* the 1916 Act has on the benefits accruing to the EC under those agreements); and (3) determine whether the "levels" (i.e., the position in respect of the amount, intensity or extent) are "equivalent" to one another. The levels are what matters – not the qualitative aspects of the proposed suspension or nullification or impairment. If the level of the suspension proposed by the EC exceeds the amount of the trade effects of the 1916 Act, that fact alone would be dispositive: it would not matter whether the proposed suspension or nullification or impairment are qualitatively similar.

17. Indeed, there is no requirement under Article 22 that the proposed suspension or nullification or impairment be "qualitatively equivalent" to one another. For example, if one WTO member refuses to lift a ban on bovine meat imports containing hormones, the DSB may authorize another WTO member to suspend its tariff concessions on cheese and biscuits – so long as the amount of trade affected is equivalent. As the arbitrator found in *Hormones*, "these are *qualitative* aspects of the proposed suspension touching upon the 'nature' of concessions to be withdrawn. They fall outside the arbitrators' jurisdiction."[10]

18. As a result, the quantitative and qualitative approaches to the suspension of obligations are mutually exclusive in the sense that the former is what matters in order for an arbitrator to successfully fulfill its mandate under DSU Article 22.7, while the latter is – in the view of the United States – irrelevant to the exercise.

Question 7. What is the relevance for the purposes of this current

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[9] Although the EC admits there has been no nullification or impairment due to any award (treble damages or otherwise) under the 1916 Act.

[10] Article 22.6 Arbitration Award in *European Communities – Measures Concerning Meat and Meat Products (Hormones) – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WT/DS26/ARB, 12 July 1999, para. 19.

arbitration of the finding of the original panel that the 1916 Act "nullifies or impairs benefits accruing to the European Communities under the WTO Agreement."

19. The original panel simply *presumed*, in accordance with Article 3.8 of the DSU, that a breach of the rules has an adverse impact on other Members. The panel did not analyze the issue or make a finding of any particular nullification or impairment to the EC. Consistent with Article 3.8, it neither identified any benefit that was nullified or impaired, nor attempted to determine what the level of nullification or impairment was.

20. However, as the arbitrator made clear in *EC – Bananas*:

> The *presumption* of nullification or impairment in the case of an infringement of a GATT provision as set forth by Article 3.8 of the DSU cannot in and of itself be taken simultaneously as *evidence* proving a particular level of nullification or impairment allegedly suffered by a Member requesting authorization to suspend concessions under Article 22 of the DSU[.] The review of the level of nullification or impairment by Arbitrators from the objective benchmark foreseen by Article 22 of the DSU, is a *separate process* that is *independent from* the finding of infringements of WTO rules by a panel or the Appellate Body. ... [A] Member's legal interest in compliance by other Members does not, in our view, automatically imply that it is entitled to obtain authorization to suspend concessions under Article 22 of the DSU.[11]

21. Thus, if the Arbitrator were to determine that the level of nullification or impairment caused by the 1916 Act is zero, that determination would not be inconsistent with the panel's *presumption* in the underlying dispute.

22. Indeed, it is entirely possible for there to be a presumption of nullification or impairment pursuant to an underlying dispute, yet the level of nullification or impairment for the complaining party is still zero.[12] An example of this is when a responding party is found to have breached a tariff binding on particular products, yet the complaining party does not export such products into

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[11] Article 22.6 Arbitration Award in *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU*, WT/DS27/ARB, 9 April 1999, para. 6.10.

[12] It is presumably for this reason that Article 3.8 of the DSU does not speak of a presumption of nullification or impairment to the "complaining" party, but only to "other Members parties to that covered agreement," and makes the presumption rebuttable. Nothing in Article 3.8 requires the rebuttal to be made during the panel proceedings as opposed to an Article 22.6 arbitration.

the territory of the responding party. Another example would be where an SPS measure only applies to the products of some Members but not to products of the complaining party. A further example is when a law is found to be WTO-inconsistent on its face, but it has never been applied on the account of its condition precedent having never been met. This latter example is in fact the situation in this case.

> **<u>Question 8.</u> In the context of the present case, does the DSU impose any obligation on the European Communities to ensure that the authorized level of suspension of obligations, once implemented, does not exceed the level of nullification or impairment? If the answer is yes, please comment on how this could be ensured with respect to the proposed EC legislation.**

23. The purpose of this arbitration proceeding is to ensure that the level of suspension authorized by the DSB does not exceed the level of nullification or impairment of the EC's benefits. The EC in turn would only be authorized to suspend up to the level specified by the DSB. Any additional suspension would be in breach of the EC's obligations under the WTO Agreement, and the United States assumes that the EC would comply with its obligations in good faith.

24. Arbitrators can ensure that the proper level of suspension is authorized by considering the evidence put forward by the parties to an Article 22.6 arbitration and then determining for themselves the accurate level of nullification or impairment. As noted earlier, previous arbitrators have all done so by quantifying the level of nullification or impairment.

> **<u>Question 9.</u> In a situation where the proposed suspension of other obligations could be implemented in such a way that it would not exceed the equivalent level of nullification or impairment, but could equally be implemented in such a way that it would exceed that level, would the arbitrator be required or authorized to attach conditions to its award in order to be sure that the level of nullification or impairment would not be exceeded?**

25. The United States finds it difficult to conceive of a situation in which the DSB has specified the level of suspension that it authorizes, but a Member could implement that authorization in a way that it could exceed that level. The United States notes that the *Bananas* arbitrator in WT/DS27 went to some lengths to explain how a request could be framed, and in the dispute *Brazil – Export Financing Programme for Aircraft* (WT/DS46), the arbitrator specified a level of countermeasures and stated: "In this respect, the Arbitrators urge Canada to make sure that, if it decides to proceed with the suspension of certain of its obligations vis-à-vis Brazil referred to in document WT/DS46/16 other than the 100 per cent surtax, this will be done in such a way that the maximum amount of countermeasures referred to in the preceding paragraph will be respected." Although that arbitration involved Article 4 of the SCM Agreement rather than Article 22.2, the general principle is analogous.

26. In this proceeding, the appropriate condition which the Arbitrator could impose is that the EC's suspension not exceed the level of nullification or impairment – that is, zero. In light of how the EC has described its proposal to date, the level of suspension for which it seeks authorization clearly exceeds this level.

> **Question 10. Having regard to the ordinary meaning of the word "equivalent" (equal in value, significance or meaning, that is virtually the same thing, having the same effect, The New Shorter Oxford Dictionary, 1993, p. 843), could each party explain how its approach would meet that definition?**

27. The definition of "equivalent" provided above makes clear that the comparison needs to ensure that the level of suspension and of nullification or impairment are equal. The U.S. approach looks at the amount or extent of the effect on trade, thus ensuring that the levels are equal. A "quantitative benchmark" is necessary to make the comparison and, ultimately, to determine equivalence. This has been the conclusion of all previous arbitrators.

> **Question 11. The Arbitrator understands that the EC Commission has prepared a proposal for a "blocking legislation" (COM (2003) 543 final). What is the relevance, if any, of this proposed regulation for the purposes of this arbitration?**

28. The United States understands that the blocking legislation has not yet entered into force. The United States does not believe it is appropriate to engage in a "prospective analysis" regarding the level of nullification or impairment. Indeed, in keeping with their terms of reference, arbitrators in previous cases have generally examined the period *before* the matter was referred to arbitration to determine the level of nullification or impairment. By contrast, the EC in this dispute habitually engages in speculation on future events. For example, it speculates on how a U.S. court may one day interpret the "intent" requirement in the 1916 Act; it complains about the "unpredictable" U.S. jury system (ignoring the fact that a jury has never issued a verdict against a defendant under the 1916 Act); it speculates that the U.S. Congress will repeal the 1916 Act but will not terminate existing cases; and it repeatedly refers to treble damage awards and imprisonment (again, ignoring the fact that such awards and penalties have never been issued in the 87-year history of the 1916 Act).

29. On the other hand, while insisting on such a speculative analysis, the EC fails to extend this analysis to the much more likely scenario that any future treble damage award under the 1916 Act would likely be limited (if not erased entirely) because of the blocking legislation. The blocking legislation is relevant to the extent it provides further support that the level of nullification or impairment for purposes of the terms of reference of this arbitration not only is zero, but that it will remain zero even for the period outside the terms of reference of this arbitration. If the level of nullification or impairment had been greater than zero, then any authorized level of suspension would have had to be reduced by the amount that the blocking legislation would reduce the nullification or impairment. The EC could not have both suspended

concessions or other obligations for the full amount of any nullification and impairment while simultaneously reducing that nullification or impairment through its blocking legislation.

30. Finally, it is worth noting that, at present, *no EC company is a defendant in any proceeding involving the 1916 Act.* All claims against EC companies have been dismissed, either because the claims were found to lack merit or because the parties settled the matter.

Question 12. In the present case, is it necessary or appropriate for the arbitrators to take into consideration the decisions of previous arbitrations that considered requests for "countermeasures" under the SCM Agreement?

31. It is neither necessary nor appropriate to consider those aspects of those arbitrations dealing with the particular provisions of the SCM Agreement, such as the level of countermeasures that may be authorized. At the same time, those arbitrations were conducted under Article 22.6 of the DSU and so may be of some value to the extent they discuss the DSU. Those previous arbitrations clearly distinguished "appropriate countermeasures" under the SCM Agreement from the analysis under Article 22.4 and Article 22.7 of the DSU. For example, in *United States – Tax Treatment for "Foreign Sales Corporations"*, the Arbitrator made the following observations:

> The drafters [of Article 22 of the DSU] have explicitly set a quantitative benchmark to the level of suspension of concessions or other obligations that might be authorized. ... As we have already noted in our analysis of the text of Article 4.10 of the *SCM Agreement* above, there is, by contrast, no such indication of an explicit quantitative benchmark in that provision. ... There can be no presumption, therefore, that the drafters intended the standard under Article 4.10 to be necessarily coextensive with that under Article 22.4 so that the notion of "appropriate countermeasures" under Article 4.10 would limit such countermeasures to an amount "equivalent to the level of nullification or impairment" suffered by the complaining Member. Rather, Articles 4.10 and 4.11 of the *SCM Agreement use distinct language and that difference must be given meaning.*[13]

Question 13. What relevance, if any, does DSU Article 22.5 have to this arbitration?

32. The United States recalls that several WTO Members expressed their "systemic"

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[13] Arbitration Award in *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WT/DS108/ARB, 30 August 2002, paras. 5.46 - 5.47 (emphasis added).

concerns regarding the EC's proposal to suspend its obligations, and at least one WTO Member referred directly to Article 22.5 of the DSU.[14] Article 22.5 is also useful context in that it confirms that the requesting Member must specify the concessions or other obligations it intends to suspend such as to allow the DSB to ensure compliance with Article 22.5.

Questions to the United States:

> **Question 14. Assuming the United States agrees that one of the purposes of suspension of concessions or other obligations under the DSU is to induce compliance with WTO obligations, how can such compliance be achieved through suspension of concessions or other obligations in the case of a challenge to a measure that has been found to be WTO-inconsistent "as such", i.e. irrespective of its application in a particular case?**

33. Whatever the purposes for the suspension of concessions or other obligations,[15] the standard under Article 22.7 is equivalence. If the level of nullification or impairment is zero, Article 22.7 requires that the level of suspension or other obligations be no higher.

34. The United States considers that the analysis under Article 22.7 in an "as such" case is not dissimilar to that in an "as applied" case. In an "as such" case, the Article 22.6 arbitrator is looking at the measure that has been found to be WTO-inconsistent on its face, and – by reviewing the evidence of how the measure has affected trade (in its form as of the time the matter was referred to arbitration, which is consistent with the practices of all previous arbitrators) – must then determine the level of nullification or impairment based on this evidence of trade effect. In an "as such" case, the only breach of the WTO Agreement found by the DSB is with respect to the law. There has been no finding that a particular application of the law is in breach. In an "as applied" case, the arbitrator goes through the same exercise, with the possible exception of looking at only particular provisions of the measure "as applied."

35. In any event, in this dispute, there has never been an award under the 1916 Act in its entire history. The EC has provided no evidence that trade has ever been affected. The answer would be the same regardless of whether the EC had examined the law "as such" or "as applied."

> **Question 15. Is it the position of the United States that a law "as such" does not have a direct trade impact, and therefore could not give rise to the right of a complaining Member to seek suspension of concessions or other**

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[14] *See* Dispute Settlement Body, Minutes of Meeting, held on 18 January 2002, WT/DSB/M/117, 15 February 2002, at para. 18 (statement of Hong Kong, China).

[15] One could also argue that the purpose of suspension is to restore the balance of benefits under the covered agreements between the parties to the dispute. Such a purpose would confirm that there should be no suspension authorized if the complaining party is not suffering nullification or impairment. Otherwise the complaining party would enjoy a greater level of benefits than it had negotiated under the covered agreements.

obligations?

36. No. The United States believes that a law "as such" can have a direct trade impact and can give rise to the right of a complaining Member to seek suspension. The United States notes that the arbitrator in the *Section 110 Copyright* dispute was considering a law "as such" and not considering any particular application of that law.[16]

37. In this case, however, the United States believes – and has demonstrated – that, if the 1916 Act were repealed tomorrow, imports from the EC would not increase. This is due to the special circumstances of this case, including the fact that there has never been an award under the 1916 Act, and other U.S. competition and anti-dumping laws already address the same conduct as the 1916 Act.

Question 16. Does the United States consider that reciprocal or "mirror" retaliation – suspension of the same obligations which have been breached by the Member which is the object of the retaliation – is in principle permissible under the DSU provided that the level of suspension is equivalent to the level of nullification or impairment?

38. The United States agrees that the suspension of the same obligations is, in principle, permissible under the DSU provided that the level of suspension is equivalent to the level of nullification or impairment. In fact, pursuant to the first sentence of Article 22.7, the Arbitrator is not to examine the nature of the concessions or other obligations to be suspended: whether the obligations are the same or different is not directly relevant.

Question 17. If the EC provided evidence on the level of nullification or impairment arising from the 1916 Act, and if it proposed a specific level of suspension, would the arbitrators be permitted under DSU Article 22 to authorize the EC to adopt an equivalent legislation to the 1916 Act?

39. If the EC were to have provided this evidence and if it had proposed a specific level of suspension, and the Arbitrator were to determine that these were equivalent, then the DSB could authorize that level of suspension. In any event, the DSB does not authorize the adoption of a "measure," but only the suspension of concessions or other obligations. Whether the EC's proposed measure resembles the 1916 Act is irrelevant under Article 22.

Question 18. With reference to paragraph 12 of the US written submission, could the United States please provide details regarding the three court cases referred to (including re: (1) parties involved and their nationalities, (2) dates

[16] Unlike in this proceeding, there both parties accepted that the level of nullification or impairment was greater than zero, and the arbitrator found a level of $1.1 million per year. That is significantly higher than the level of zero in this proceeding, but lower than the EC's proposed unlimited level.

of initiation of 1916 Act proceedings, (3) current status of the cases, (4) whether the sales contract had been completed at the time of initiation of the 1916 Act proceedings, etc.)? Are any of the products covered by these proceedings currently subject to any measure or proceedings under any other US trade remedy legislation?

40. The three cases referred to in paragraph 12 of our written submission are: (1) *Bruno Independent Living Aids v. Acorn Mobility Services* ("*Bruno*"), (2) *Goss International Corporation v. Man Roland Druckmaschinen* ("*Goss*"), and (3) *AK Steel Corp. v. Usinor* ("*AK Steel*"). However, as explained below, all claims involving EC companies have been dismissed, either because the claims have been found to be without merit or because the parties have settled.

41. Parties involved and their nationalities. *Bruno.* The plaintiff in *Bruno* was Bruno Independent Living Aids, Inc., a Wisconsin corporation. The defendants were Acorn Mobility Services Ltd, an foreign corporation with its principal place of business in England and Acorn Stairlifts, Inc., a Florida corporation.

42. *Goss.* The plaintiff in *Goss* was Goss Graphic Systems, Inc., a Delaware corporation. The defendants were Man Roland Druckmaschinen Aktiengesellschaft, a German corporation; Man Roland, Inc., a Delaware corporation; Koenig & Bauer Aktiengesellschaft, a German corporation; KBA North America, Inc., a Delaware corporation; Tokyo Kikai Seisakusho, Ltd. a Japanese corporation; TKS (U.S.A.), Inc., a Delaware corporation; Mitsubishi Heavy Industries, Ltd., a Japanese corporation; and MLP U.S.A., Inc., a Delaware corporation.

43. *AK Steel*. The plaintiff in *AK Steel* is AK Steel Corporation, headquartered in Ohio. Three French companies are defendants in *AK Steel*: Usinor, S.A.; Sollac, S.A.; and Ugine, S.A.. One French citizen, Pascal Payet-Gaspard, is also a citizen in that case. Two U.S. companies, J&L Specialty Steel, Inc. and Hague Steel Corporation, are also defendants in that case.

44. Dates of Initiation. The complaint in *Goss* was filed on March 7, 2000, in Iowa. The complaint in *Bruno* was filed on July 9, 2002 in Wisconsin. The complaint in *AK Steel* was filed on February 15, 2002 in Ohio.

45. Current Status of the Cases. The court in *Bruno* dismissed the case as without merit before the case proceeded to trial. In *Goss*, with the exception of one Japanese defendant, the parties agreed to dismiss the case before it proceeded to trial. (The United States understands that the trial involving the Japanese defendant began on November 17, 2003. It is not clear whether claims in addition to claims under the 1916 Act will be the subject of that trial.) In *AK Steel*, we understand that the parties agreed to dismiss the case on November 13, 2003. Thus, to the best of our knowledge, at present, *no EC company is a defendant in any case involving the 1916 Act*.

46. Contract Date. The United States understands (1) the contracts in question in *Bruno* were first offered in October 2001; and (2) some, if not all, of the contracts involved in *AK Steel*

were concluded between mid-2000 and January 2002. It is not clear when the contracts were concluded in *Goss*.

47. Antidumping Proceedings. *AK Steel*. The U.S. Department of Commerce ("Commerce") determined in 1999 that the product in *AK Steel* (stainless steel) was being dumped in the United States, and the U.S. International Trade Commission ("ITC") determined that imports of that product materially injured the domestic industry. We understand that the antidumping duty order applicable to stainless steel products from France is still in force today.

48. *Goss.* With respect to the relevant product in *Goss* (printing presses for newspapers), on September 4, 1996, after the ITC determined that imports of that product materially injured the domestic industry, Commerce issued notices of antidumping duty orders that imposed tariffs of 62 percent on imports by Mitsubishi; 56 percent on imports by Tokyo Kikai; 31 percent on imports by MAN; and 46 percent on imports by Koenig & Bauer. We understand that this antidumping duty order was revoked in 2002 because the U.S. producer ceased production in the United States.

49. *Bruno.* To the best of our knowledge, the relevant product in *Bruno* (stairlifts) has not been the subject of an antidumping duty investigation or order.

Question 19. Regarding civil suits under the 1916 Act, if the suit is decided in favour of the plaintiff, what happens to the goods imported / to be imported?

50. First, the United States is reluctant to speculate as to what would happen if a civil suit under the 1916 Act were one day decided in favor of the plaintiff. Such speculation is, to our knowledge, unprecedented in arbitrations under Article 22.6 and would fail to ensure that the level of suspension is equivalent to the level of nullification or impairment. Just because the EC is unable to establish nullification or impairment during the period before this matter was referred to arbitration, it should not be allowed to base the level of nullification or impairment on speculation about events that may – or may not – occur in the future.

51. Second, nothing in the 1916 Act suggests that the goods imported or to be imported would be directly affected by such a judgment. Instead, the 1916 Act provides for treble damages. Again, however, the United States can only speculate as to what would happen in these circumstances because a civil suit under the 1916 Act has never been decided in favor of a plaintiff. And again, such speculation should not be taken into account when determining the level of nullification or impairment for purposes of this arbitration.

Question 20. With reference to paragraphs 28 and 39 of the US written submission, please provide details regarding the extent to which the conduct prohibited by the 1916 Act is already prohibited or actionable under other US anti-dumping or US competition laws.

52. U.S. Anti-Dumping Laws. Article VI of the GATT 1994 states that, as a general matter, dumping "is to be condemned." As a general rule, under U.S. law (and the WTO agreements), dumping occurs if the price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." The 1916 Act addresses the situation in which a person sells articles "at a price substantially less than the actual market value or wholesale price of such articles ... in the principal markets of the country of their production ... after adding to such market value or wholesale price, freight, duty, and other charges and expenses necessarily incident to the important and sale thereof in the United States," with the added requirement of the "intent of destroying or injuring an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States." As the Panel found, "[t]here is consequently a *very strong similarity* between the definition of dumping in Article VI and the transnational price discrimination test found in the 1916 Act."[17]

53. U.S. Competition Laws. A number of U.S. laws address the situation in which a party acts with the intent of destroying or injuring an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States. For example, section 2 of the Sherman Act provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court." 15 U.S.C. section 2. In addition, the Robinson-Patman Act contains a criminal provision which provides in pertinent part: "It shall be unlawful for any person engaged in commerce, in the course of such commerce, ... to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor." 15 U.S.C. section 13a. Thus, just as the 1916 Act prohibits the sale of goods at a price "substantially less" than a benchmark price with the intent of "destroying" an industry or of "restraining or monopolizing" trade, other U.S. laws prohibit the sale of goods at "unreasonably low prices" for the purpose of "destroying competition."

54. In addition, the EC has asserted that, because of the mere presence of the 1916 Act, its companies will need to be "less aggressive in their commercial activity" and to "act very carefully in order not to create a situation than [*sic*] can be even faintly considered as dumping."[18] The EC baldly alleges that the U.S. jury system is "unpredictable," and, as a result, companies will need to be cautious even if they objectively are not violating the 1916 Act. As a result, the EC appears to believe the 1916 Act has a deterrent effect even where the requisite intent under the 1916 Act is not present. (*See* Question 27.) These allegations about the U.S. jury system are false and baseless; the United States regrets that the EC would make such outrageous statements

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[17] Panel Report in *United States – Anti-Dumping Act of 1916 –Complaint by the European Communities*, WT/DS136/R, 31 March 2000, para. 6.108 (emphasis added).

[18] EC Written Submission at paras. 32 and 37.

in this proceeding about a fundamental principle of the U.S. legal system. Moreover, the United States wishes to note that the right to a jury is not limited to cases involving the 1916 Act. Thus, even if the 1916 Act were repealed, EC companies would still need to limit their "aggression" in their commercial activity, so as to avoid a law suit under other U.S. antitrust laws.

55. We therefore doubt that any EC company would believe that it could engage in such conduct but for the 1916 Act.

> **<u>Question 21.</u> Could the United States comment on the EC's views on the notion of "benefit" under Article XXIII.1 of the GATT 1994 (EC submission, paras. 22-23). How does the United States reconcile its opinion that nullification or impairment can only correspond to trade loss with the terms "benefits accruing [to a Member] directly or indirectly under this agreement" in Article XXIII.1 of GATT 1994?**

56. First, the EC's views on the notion of "benefit" under Article XXIII:1 of the GATT 1994 are similar to statements the United States made in its submission. In footnote 25 of our submission, we stated that "[t]he reference in Article 22 of the DSU to a level of 'nullification or impairment' refers to the nullification or impairment of 'any benefit accruing' to a WTO Member 'directly or indirectly' under any WTO agreement."

57. In assessing the level of nullification or impairment pursuant to Article 22.6, one must first identify the concrete "benefits" under the WTO agreements that have been found to be nullified or impairment. In this particular case, the only benefits at issue are those that the EC had claimed in the underlying panel proceeding are affected by the 1916 Act, i.e., the EC had claimed nullification or impairment of particular benefits accruing directly to it under the GATT 1994 and the Antidumping Agreement. The GATT 1994 and the Antidumping Agreement, and indeed the WTO agreements as a whole, concern trade. Therefore, pursuant to GATT Article XXIII:1, we are dealing here only with trade benefits, and thus nullification or impairment of such benefits necessarily means trade losses.

58. It is also important to note that there is no basis for considering claims of lost benefits under provisions of the covered agreements where there is no DSB finding of a breach of those provisions. Moreover, one cannot consider those benefits that were never claimed by the complaining party to be nullified or impaired. Indeed, the EC never claimed in the underlying panel proceeding that any benefits accruing indirectly to it under these agreements were being nullified or impaired. Therefore it is not entitled to take into account any such supposed benefits. Similarly, the EC is not entitled to take into account any benefits it never claimed to be nullified or impaired by the 1916 Act in determining the level of nullification or impairment for purposes of Article 22.6, such as benefits under WTO agreements other than the GATT 1994 or the Antidumping Agreement, or benefits under non-WTO agreements.

> **<u>Question 22.</u> Paragraph 7.1 of the original Panel report concludes, *inter alia*, that the 1916 Act violates Article XVI:4 of the Agreement Establishing the**

WTO. Could the United States comment on the legal implications of the Panel's conclusion in light of the US position that the nullification or impairment arising from the 1916 Act is "zero"?

59. As explained in response to Question 7 above, the original Panel *presumed*, in accordance with Article 3.8 of the DSU, that a breach of the rules has an adverse impact on other Member parties to that covered agreement. We have already explained why an application of the Article 3.8 *presumption* in one proceeding cannot constitute *evidence* of nullification or impairment in a separate proceeding under Article 22.6.

60. The Panel derived its finding of a violation of Article XVI:4 entirely from its findings of violations of Article VI:1 and VI:2 of the GATT 1994. Just as a presumption of nullification or impairment under Article 3.8 cannot serve as evidence of nullification or impairment, the Panel's finding of a violation under Article XVI:4, which was entirely derivative of other findings, cannot also serve as evidence of nullification or impairment.

<u>Question 23.</u> Could the United States explain in what respect a review by the Arbitrator of the elements of a proposed domestic legislation is equivalent to "examin[ing] the nature of the concessions or other obligations to be suspend" (Article 22.7 DSU)?

61. The EC's approach in this proceeding has been to emphasize that some of the qualities of its proposed domestic legislation resemble some of the qualities of the 1916 Act. It apparently hopes that the Arbitrator will focus its attention on any similarities between these two measures – and ignore the fact that the EC is seeking authorization to impose some form of treble damages without limitation, even though there has never been a treble damages award in the history of the 1916 Act.

62. This focus on the qualitative aspects of the proposed suspension, rather than on the level of suspension and the level of nullification or impairment, is inconsistent with Article 22.7 of the DSU. Article 22.7 mandates arbitrators to determine equivalence between the level of suspension and the level of nullification or impairment, not equivalence between the measure that will implement the suspension and the measure that resulted in the nullification or impairment. Indeed, the first sentence of Article 22.7 appears to prohibit even the examination of the measure for implementing the proposed suspension of concessions or other obligations. The arbitrator in *Hormones* reached the same conclusion after the EC asked it to request a specific product list from the United States:

> Arbitrators are explicitly prohibited from "examin[ing] *the nature* of the concessions or other obligations to be suspended" (other than under Articles 22.3 and 22.5). On these grounds, we cannot require that the US further specify the nature of the proposed suspension. As agreed by all parties involved in this dispute, in case a proposal for suspension were to target, for example, only

> biscuits with a 100 per cent tariff *ad valorem*, it would not be for the arbitrators to decide that, for example, cheese and not biscuits should be targeted; that a 150 per cent tariff should be imposed instead of a 100 per cent tariff; or that tariff increases should be levied on a product weight basis, not *ad valorem*. All of these are *qualitative* aspects of the proposed suspension touching upon the "nature" of concessions to be withdrawn. They fall outside the arbitrators' jurisdiction. What we have to determine ... is whether the overall proposed level of suspension is *equivalent* to the level of nullification or impairment. This involves a *quantitative* – not a qualitative – assessment of the proposed suspension.[19]

63. Contrary to the text of the DSU, the EC once again wants this Arbitrator to focus on the qualitative aspects of its proposed suspension and to determine that these qualitative aspects are equivalent to the qualitative aspects of the 1916 Act. Just as the arbitrator in *Hormones* reminded the EC: an Article 22.6 arbitrator is to engage in a quantitative assessment of the proposed suspension and to determine whether the overall proposed level of suspension is equivalent to the level of nullification or impairment.

Question 24. If the drafters of Article 22 of the DSU intended to require the quantification of the "level" of suspension, why did the drafters not use the word "amount" instead of "level"?

64. One can only speculate as to why the drafters chose one word over another. However, as explained in response to Question 4, the appropriate definition of the word "level" is "[a] position (on a real or imaginary scale) in respect of amount, intensity, extent, etc.; a relative height, amount, or value." Thus, the term "level" describes the concept more comprehensively than the term "amount". Yet it recognizes that the amount (or intensity, extent, etc.) has a position on a scale. In other words, by using the term "level," the drafters in fact acknowledged that the quantity on the "suspension" side of the ledger shall be weighed against the quantity on the "nullification or impairment" side of the ledger to determine equivalence.

65. Also, it is important to note that the drafters of Article 22 did not mandate that arbitrators "shall determine whether the concessions or other obligations to be suspended is equivalent to the nullification or impairment," which is how Article 22.7 would have read if the EC's interpretation was correct. Rather, the drafters specifically added the word "level" to make clear that arbitrators "shall determine whether the *level* of [the concessions or other obligations to be suspended] is equivalent to the *level* of nullification or impairment." (Emphasis added.)

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[19] Article 22.6 Arbitration Award in *European Communities – Measures Concerning Meat and Meat Products (Hormones) – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WT/DS26/ARB, 12 July 1999, paras. 18-20 (underline added for emphasis).

<u>Question 25.</u> What is the position of the United States on the other purposes of suspension of concessions or other obligations, i.e. the purposes other than inducing compliance? To what extent, if any, should these other purposes affect the assessment by the arbitrators of the equivalent level of nullification or impairment?

66. The purposes of suspension of concessions or other obligations are not set forth in the DSU, but in any event the requirements of Article 22.7 are clear. These requirements must be clarified based on the text, read in its context and in light of the agreement's object and purpose, and not on assumptions of the purposes of suspension of concessions or other obligations.

67. To the extent that negotiators intended suspension of concessions to "induce compliance," this purpose is to be effected under the limits set forth in Article 22.7. Articles 22.4 and 22.7 prohibit a level of suspension in excess of the level of nullification or impairment. As the arbitrator in *Bananas* explained, the purpose of inducing compliance "does not mean that the DSB should grant authorization to suspend concessions beyond what is *equivalent* to the level of nullification or impairment." In addition, the explicit language of the DSU clarifies that there are other purposes of dispute settlement, namely to encourage parties to reach mutually acceptable solutions.

68. The United States does not believe it would be appropriate for it (or the Arbitrator) to attempt to provide a comprehensive list of the purposes behind the suspension of concessions, or to rank these purposes in some sort of order of priority. Nevertheless, the central placement of the term "equivalent" in Articles 22.4 and 22.7 (and the authorization of mutually acceptable compensation in lieu of the implementation of recommendations and rulings) suggests that one purpose of Article 22 may be to re-balance the rights and obligations of WTO Members. In that regard, Article 3.3 of the DSU provides that one purpose of dispute settlement is "the maintenance of a proper balance between the rights and obligations of Members."